U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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FILE: LIN 07 086 51566 Office: NEBRASKA SERVICE CENTER Date: SEP 02 2009

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an energy infrastructure development firm. It seeks to employ the beneficiary permanently in the United States as a project coordinator. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the position's requirements set forth on the labor certification do not require a member of the professions holding an advanced degree.

On appeal, counsel requests reconsideration of the petition under both second preference as an alien of exceptional ability and under third preference. Counsel failed to send any brief and/or additional evidence of these qualities within 30 days as indicated on the Form I-1290B, Notice of Appeal or Motion.

In this matter, the petitioner sponsored the alien for a visa under paragraph d of the I-140 as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to section 203(b)(2) of the Act. As the director stated, 8 C.F.R. 204.5(k)(2) provides that "an advanced degree means any degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

The regulation at 8 C.F.R. § 204.5(k)(4) also provides in pertinent part that the "job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability."

The alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. The educational, training, and experience requirements are set forth in Part H-4 through 10-B. In this case, the petitioner required a Bachelor's degree in civil engineering and 48 months (4 years) of experience. It stated that it would accept 48 months in an alternate occupation of civil engineer or engineering manager. The petitioner, however, had requested a visa classification as a member of the professions holding an advanced degree, which, under section 203(b)(2) of the Act, requires a minimum of least a bachelor's degree and 5 years of progressive experience or a master's degree.

The director denied the petition because the labor certification's minimum training and experience requirements do not describe a position that would require at least a bachelor's degree and 5 years of progressive experience or a master's degree requirement. The director concluded that the position was not eligible to be classified as an advanced degree position as the petitioner had requested on the I-140.

Counsel requested the beneficiary's re-classification as an exceptional alien under section 202(b)(2) of the Act or as a third preference professional or skilled worker under Section 203(b)(3)(A)(i) or (ii) on appeal.

The regulation at 8 C.F.R. § 204.5(K)(3)(ii) provides that any three of the following may be accepted as evidence of exceptional ability;

(1) Degree relating to area of exceptional ability;
(2) Letter from current or former employer showing at least 10 years experience;
(3) License to practice profession;
(4) Person has commanded a salary or remuneration demonstrating exceptional ability;
(5) Membership in professional association;
(6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.

Comparable evidence may be submitted if above categories are inapplicable. This evidence may include expert opinion letters.

These criteria serve as guidelines, but evidence that a beneficiary may meet three of these criteria is not dispositive of whether the beneficiary is an alien of exceptional ability. It must also be established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. Additionally, the regulation at 8 C.F.R. 204.5(k)(2)(4)(i) provides that the job offer of the individual labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability. Under these standards, the AAO finds no evidence in the record that the job offer requires an alien of exceptional ability or that the beneficiary would qualify for classification as an alien of exceptional ability.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

With respect to the petitioner's request to be considered under the third preference, petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). It is noted that neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility for the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification

requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under a lesser classification.

For the above-stated reasons, the petition's denial is affirmed and the appeal will be dismissed. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.